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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 831

PAUL GINSBURG, Petitioner,

v.

HORACE STERN, ALLEN M. STEARNE, CHARLES ALVIN JONES, JOHN C. BELL, JR., THOMAS McKEEN CHIDSEY, MICHAEL A. MUSMANNO, and JOHN C. ARNOLD, individually and jointly as Justices of the Supreme Court of Pennsylvania, Respondents.

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 834

PAUL GINSBURG, Petitioner,

v.

HORACE STERN, ALLEN M. STEARNE, CHARLES ALVIN JONES, JOHN C. BELL, JR., THOMAS McKEEN CHIDSEY, MICHAEL A. MUSMANNO, and JOHN C. ARNOLD, individually and jointly as Justices of the Supreme Court of Pennsylvania, Respondents.

PETITIONER'S REPLY BRIEF

The respondents' Brief in Opposition does not contain any factual or legal opposition to the Petition whatever. They studiously avoided any discussion of *the law* on lack of immunity and *the procedure* on waiver of the affirmative defense of immunity by failure to plead it. the only issues properly before this Honorable Court. Instead they took the position that the only issue herein (not considered by the District Court) is the sufficiency of the complaint because "The only question which was decided by the Court of Appeals was the sufficiency of the complaint" (p. 5). In the District Court these respondents persuaded Judge McIlvaine to give them, who are admittedly his close personal friends, an Order dismissing the complaint solely on the ground of immunity,

which affirmative defense (not procedurally a subject of a motion to dismiss) was not pleaded by them and was therefore waived. Then in the Court of Appeals they easily induced that "reviewing court" to affirm, but the affirmance necessarily had to be on a ground which was not properly a subject of *review*. The Court of Appeals could not and did not affirm legally, and could not affirm by way of review without reversing itself in the *Picking* decision and without overruling this Honorable Court's decisions in the *Tenney* and other cases. Furthermore, the Court of Appeals would not reverse, although required to do so, because then it would be making the distasteful admission as a matter of record that your petitioner, not the respondents, has been advocating the correct interpretation of the law on lack of immunity; and it would be making it manifest that its refusal to decide the important Civil Rights issue on immunity (in the instant appeal and) in two prior appeals has been nothing but a political favor to these respondents from their good-fellow members of the bench. Now the respondents presume to have this Honorable Court sanction the lower departures from the usual and accepted course of judicial proceedings.

The repeated erroneous decisions on the issue of immmunity in Civil Rights cases by the District Court has caused undue confusion among members of the bench and bar. The repeated refusal of the Court of Appeals to reverse (or affirm) on that issue has not only added to the confusion, but also has created numerous conflicts on that question in federal courts throughout the United States. It is of national importance, therefore, that this Honorable Court decide that issue herein. Such decision,

or clarification, would serve a two-fold purpose. It would prevent a multiplicity of such suits which are bound to be filed, if the decision holds that members of the state judiciary have immunity from such suits under the Civil Rights Acts; and, on the other hand, it would allow the intended protection and enforcement of civil rights by blocking the immunity escape, if the decision reaffirms the law on lack of immunity. Is that not fair enough? How can the respondents as Justices of the highest judicial tribunal of the great Commonwealth of Pennsylvania, and their counsel as head of its Department of Justice, sincerely object to such fair administration of justice? As a matter of fact, your petitioner argued below that Hon. Thomas D. McBride, as Attorney General of Pennsylvania, was inappropriately representing the respondents herein instead of dutifully representing your petitioner against them (Paragraph 2 of 3 C C A Petition for Rehearing).

In view of the Record, it is respectfully submitted that because of the high official capacities enjoyed by the respondents and their counsel, their adoption and prosecution of such questionable departures from the usual and accepted courses of judicial proceedings to say nothing of their muzzling of your petitioner who would dare expose their deprivations of his property, constitutional and civil rights and seek restitution, is not a good example to ordinary litigants and their attorneys. Is it too much to ask, or too unreasonable to expect, that the Supreme Court of the United States straighten out this problem in order to restore public confidence in Constitutional government?

Page 4 of respondents' Statement of the Case contains a deliberate misrepresentation of petitioner's

Complaint, which is accurately described in the Petition (pp. 6-7), detailing the three causes of action on which it is founded. Their said misrepresentation does not even merit the accusation of dealing in half-truths out of context because it falls short of even that low stature. They have taken the position, contrary to elementary legal principles which are well established, that on a motion to dismiss, the allegations of the complaint should not be taken as admitted to be true and that all inferences therefrom should be construed most unfavorably against the plaintiff's case; and further that a motion to dismiss is legally allowable in advance of the plaintiff's right to discovery (See Reason 4 for Allowance of the Writ, Petition 20-22); and even that we do not employ Notice Pleadings in federal practice. On page 5 they repeated their said misrepresentation of the Complaint in their Reasons for Denying the Writ in a wrongful attempt to disestablish the sufficiency of the Complaint. Assuming for the sake of argument that the sufficiency of the Complaint is before this Honorable Court for consideration, then it is respectfully submitted that the complaint is sufficient beyond question. See Reason 3 for Allowance of the Writ (Petition 15-20). At any rate the least that this Honorable Court should grant petitioner, in line with its recent decision in the case of *Conley v. Gibson*, 78 S. Ct. 99, entered November 18, 1957, is reversal and remand with directions for further proceedings. In that case Mr. Justice Black (p. 102) stated:

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff

can prove no set of facts in support of his claim which would entitle him to relief".

In the second paragraph of their Reasons for Denying the Writ (pp. 5-6), the respondents stated, "Although plaintiff asserts that the defendants conspired to deprive him of his rights under law, one looks in vain to discern what those rights are"; yet all that one need do is look at petitioner's Reason 3 for Allowance of the Writ (Petition 15-20) and he shall see what those rights are. Have they not argued that it is not conceivable to them that your petitioner has any rights, and, therefore, impossible for them to discern any? Furthermore they stated, "Petitioner has not been denied his liberty or his right to vote. He does not allege that he has been treated discriminatorily by reason of race or color". To this impertinent, indiscreet argument petitioner *demurringly* replies that this single part of their argument happens to be true, but it refers to only a fractional part of the many guaranteed rights and it is entirely foreign to the instant case. On page 4 of the Petition containing the Constitutional Provision Involved and the Statute Involved, it is apparent that no such limitations or restrictions are imposed upon the many rights guaranteed your petitioner (See Reason 3 for Allowance of the Writ, Petition 15-20). Here it should be pointed out how carefully the respondents avoided any discussion of these many rights to which your petitioner is entitled, the only conclusion to be drawn therefrom being that they were quite unable to produce any opposition thereto. In reply to the last sentence of said paragraph, it is denied that "The Supreme Court of Pennsylvania has granted the plaintiff his day in court and has given him complete access to

the court". It is admitted only that the plaintiff has been given complete access to the Court House, but not to the court. In reply to the rest of their argument it is solely submitted that any one learned in the law on Civil Rights actions knows that regardless of the legality or illegality of the State actions complained of, if the effect is a deprivation the Federal rights, the suit under the Civil Rights Acts is supportable and valid.

Conspicuous by its absence from their Statement of the Case is any denial or comment whatever on petitioner's Statement (pp. 7-9) wherein is stated, *inter alia*, "The result was a pattern of treatment woven against your petitioner, whereby he would always be treated courteously and politely while every one of his cases was being thrown out of court on illegal technicalities, through misconstruing of facts and/or misapplying of procedural rules and applicable law".

CONCLUSION

For the purposes of this matter, the respondents became defendants in federal court after the commencement of this action, although prior thereto they were acting as Justices of a state court. Their conduct as defendants should be scrutinized as severely as that of other defendants and treated even more strictly. Here they are treading on dangerous ground. At stake is not only the rights of one citizen, but also the tremendous strides made and accomplished in the field of Civil Rights. Their opposition to the Petition constitutes a request of this Honorable Court for a favor that would result in a conflict with its other decisions in Civil Rights actions which could lead to a series of petitions for rehearing in

and out of term time in order to reopen many "closed" cases, as well as granted Motions to Dismiss in subsequent Civil Rights actions. When their counsel impertinently argued that your petitioner was not denied his liberty or his right to vote, and does not allege that he has been treated discriminatorily by reason of race or color—the usual bases for actions in the South, is not the Attorney General of Pennsylvania attempting to reestablish a Mason-Dixon line? Or, is the Attorney General of Pennsylvania deliberately closing his eyes to the many other civil rights enumerated in Reason 3 for Allowance of the Writ, so that he can piously and "truthfully" represent to this Honorable Court that he "looks in vain to discern what those rights are"? By his opposition in general and his untenable arguments in particular, the Attorney General of Pennsylvania advocates that Pennsylvania is above the Mason-Dixon line; and that the broad and sweeping mandate of this Honorable Court on the issue of Civil Rights should be applied discriminatorily, for use below the Mason-Dixon line only. Is not the Attorney General of Pennsylvania preaching to the Attorneys General of the Southern States, "Do as I say, not as I do"?

Respectfully submitted,

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31 March 1958